



# Public Service Commission

## State of North Dakota

### COMMISSIONERS

Julie Fedorchak  
Randy Christmann  
Brian P. Kalk

Executive Secretary  
Darrell Nitschke

600 East Boulevard, Dept. 408  
Bismarck, North Dakota 58505-0480  
Web: [www.psc.nd.gov](http://www.psc.nd.gov)  
E-mail: [ndpsc@nd.gov](mailto:ndpsc@nd.gov)  
Phone: 701-328-2400  
ND Toll Free: 1-877-245-6685  
Fax: 701-328-2410  
TDD: 800-366-6888 or 711

14 November 2016

Timothy Dawson, Director  
Office of Administrative Hearings  
2911 North 14<sup>th</sup> Street – Suite 303  
Bismarck, ND 58503

Re: Dakota Access, LLC  
Dakota Access Pipeline Project  
Siting Application

Case No. PU-14-842

Dear Mr. Dawson:

Enclosed is a request for an Administrative Law Judge for the captioned case. The case is in its early stages and a Notice of Hearing has not yet been issued. When a Notice is issued we will forward it to your office. The former OAH file number associated with this case was OAH #2015-0029.

The Administrative Law Judge will serve as a procedural law judge. If you have any questions, please contact me. Thank you.

Best regards,

Illona A. Jeffcoat-Sacco  
General Counsel

enclosures

c: w/encl. Lawrence Bender  
Danielle Krause  
Blaine Johnson  
Brian Bjella  
Zachary E. Pelham





**REQUEST FOR ADMINISTRATIVE LAW JUDGE--COMPLAINT**  
**NORTH DAKOTA OFFICE OF ADMINISTRATIVE HEARINGS**  
 SFN 17818 (Rev. 06-2007)

Name of Agency, Board, or Commission North Dakota Public Service Commission		
Name of Respondent(s) Dakota Access, LLC	Address 3738 Oak Lawn Ave., Dallas, TX 75219-4333	Telephone Number (918) 492-7272
	Case No. PU-14-842	

The above named agency, board, or commission has taken administrative action pursuant to its authority found in North Dakota Century Code Chapter 49-22 \_\_\_\_\_ (North Dakota Century Code and/or North Dakota Administrative Code).

The administrative action is more fully described as follows:  
 Commission Staff believes that Dakota Access, LLC violated the Commission's 1/20/2016, 5/24/2016, and 6/22/2016 Orders by failing to obtain a clearance to proceed from the Commission prior to beginning construction on route adjustment.

Has the respondent been provided a copy of the complaint?  Yes  No

Attached is a copy of the complaint, related documents and correspondence, and certificate, affidavit or admission of service. If the respondent has otherwise been notified about this administrative action, please explain in the comments section below.

It requests designation of an administrative law judge (please check one):

- To conduct the hearing and issue recommended findings of fact, conclusions of law, and order.
- To serve as a procedural administrative law judge only (no recommended decision). The agency head will be present at the hearing as required by NDCC 28-32-31(5). See NDCC 54-57-04.
- To conduct the hearing, issue findings of fact, conclusions of law, and a final order.

**PLEASE MAKE A REQUEST FOR AN ADMINISTRATIVE LAW JUDGE AT LEAST ONE MONTH BEFORE THE HEARING.**

Agency Contact Person(s) See attached	Telephone Number
--	------------------

Representation [attorney (or other)] if known:

Agency See attached	Telephone Number
Party See attached	Telephone Number
Party See attached	Telephone Number

Additional Comments

A Notice of Hearing has not yet been issued. When a Notice is available we will forward it to your office.

The former ALJ in this case was Timothy Dawson. The former OAH number was 2015-0029.

(For agencies required to use OAH, notice of hearing will be issued by the administrative law judge, unless a procedural administrative law judge is requested. Other requesting agencies and agencies requesting a procedural administrative law judge should first contact OAH about scheduling a hearing. If notice has already been issued, attach a copy of the notice.)

Typed or Printed Name and Title of Requesting Person Illona Jeffcoat-Sacco, General Counsel	Date 11/10/2016
Signature of Requesting Person X	Telephone Number (701) 328-2407

Attachment  
 Request for ALJ  
 14 November 2016

Re: Dakota Access, LLC  
 Dakota Access Pipeline Project  
 Siting Application

Case No. PU-14-842

<b>AGENCY</b>	<b>Address</b>	<b>Telephone Number</b>
North Dakota Public Service Commission	600 E. Blvd. Ave. Dept. 408 Bismarck, ND 58505-0480	701-328-2400
<b>Representation</b> Zachary E. Pelham Pearce & Durick, PLLC Advisory Counsel	<b>Address</b> 314 E Thayer Ave PO Box 400 Bismarck, ND 58502	<b>Telephone Number</b> 701-223-2890
<b>PARTY</b> North Dakota Public Service Commission	600 E. Blvd. Ave. Dept. 408 Bismarck, ND 58505-0480	701-328-2400
<b>Representation</b> John Schuh Advocacy Staff Counsel	North Dakota Public Service Commission 600 E. Blvd. Ave. Dept. 408 Bismarck, ND 58505-0480	701-328-2421
<b>PARTY</b> Dakota Access, LLC	<b>Address</b> 3738 Oak Lawn Ave. Dallas, TX 75219-4333	<b>Telephone Number</b> 918-492-7272
<b>Representation</b> Brian Bjella Blaine Johnson	<b>Address</b> Crowley Fleck 400 East Broadway, Suite 600 PO Box 2798 Bismarck, ND 58502-2798	<b>Telephone Number</b> 701-224-7532
Lawrence Bender Danielle Krause	Fredrikson & Byron, P.A. 1133 College Drive Suite 1000 Bismarck, ND 58501	<b>Telephone Number</b> 701-221-8700



STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Dakota Access, LLC  
Dakota Access Pipeline Project  
Siting Application

Case No. PU-14-842

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

Geralyn R. Schmaltz deposes and says that:

she is over the age of 18 years and not a party to this action and, on the **9th day of November, 2016**, she deposited in the United States Mail, at Bismarck, North Dakota, **two** envelopes with certified postage, return receipt requested, fully prepaid, securely sealed and containing photocopy of:

- **Formal Complaint**
- **Motion Finding Complaint States a *Prima Facie* Case**

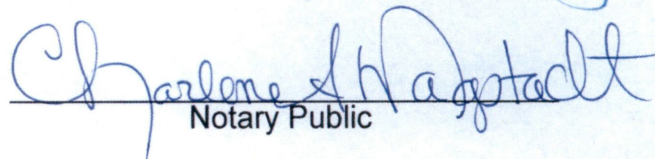
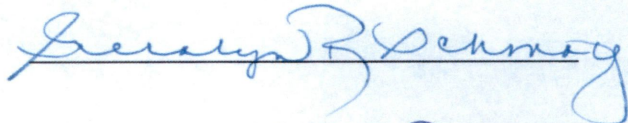
The envelopes were addressed as follows:

Lawrence Bender  
Attorney for Dakota Access, LLC  
Fredrickson & Byron P. A.  
1133 College Drive, Suite 1000  
Bismarck, ND 58501-1215  
Cert. No. 7015 0640 0006 6993 5975

Danielle Krause  
Attorney for Dakota Access, LLC  
Fredrickson & Byron P. A.  
1133 College Drive, Suite 1000  
Bismarck, ND 58501-1215  
Cert. No. 7015 0640 0006 6993 5968

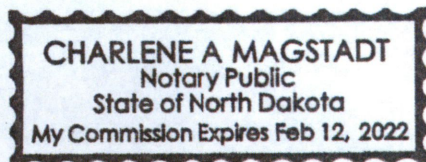
The addresses shown are the respective addressee's last reasonably ascertainable mailing address.

Subscribed and sworn to before me  
this **9th day of November, 2016**.



Notary Public

SEAL



234 PU-14-842 Filed: 11/9/2016 Pages: 10  
Affidavit of Service, Cert. Mail - Formal Complaint,  
Commission Motion

Public Service Commission



November 7, 2016

Mr. Darrell Nitschke  
Executive Secretary  
North Dakota Public Service Commission  
600 E. Boulevard, Dept. 408  
Bismarck, ND 58505-0480

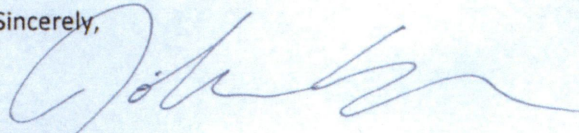
RE: Dakota Access, LLC – Case No. PU-14-842  
Enforcement Action

Dear Mr. Nitschke:

On October 25, 2016, Keitu Engineers & Consultants, Inc. filed a construction inspection report concerning the Dakota Access Pipeline Project. As a result of the report and subsequent investigation, Staff is filing a Formal Complaint against Dakota Access, LLC alleging two violations.

Enclosed is the Formal Complaint in Case No. PU-14-842.

Sincerely,



John M. Schuh  
Staff Counsel

Encl.

**BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA**

<b>Public Service Commission,</b>	)	
<b>Complainant,</b>	)	
<b>vs.</b>	)	
	)	<b>Case No. PU-14-842</b>
	)	<b>Complaint</b>
<b>Dakota Access, LLC,</b>	)	
<b>Respondent.</b>	)	

The Public Service Commission of North Dakota, by and through Advocacy Staff (Staff), for its complaint against Dakota Access, LLC (Dakota Access or the Company), alleges and shows the following:

I

Dakota Access is a registered Delaware corporation with a principal office located at 3738 Oak Lawn Avenue, Dallas, TX 75219. Dakota Access is a foreign limited liability company authorized to do business in North Dakota. Dakota Access' registered agent with the North Dakota Secretary of State is Corporation Service Company, 1709 N 19<sup>th</sup> St, Ste. 3, Bismarck, ND 58501.

II

North Dakota Century Code section 49-22-21 provides:

3. Any person who willfully engages in any of the following conduct shall be subject to a civil penalty of not to exceed ten thousand dollars for each such violation for each day that such violations persist, except that the maximum penalty may not exceed two hundred thousand dollars for any related series of violations:

....

b. Constructs, operates, or maintains an energy conversion facility or a transmission facility other than in compliance with the certificate or permit and any terms, conditions, or modifications contained therein.

....

The civil penalty provided for in this subsection may be compromised by the commission. The amount of the penalty when finally determined or agreed upon in compromise shall be deposited in the general fund and, if not paid, may be recovered in a civil action in the courts of the state.

4. Notwithstanding any other provision of this chapter, the commission may, by injunctive procedures, without bond or other undertaking, proceed against any person who willfully engages in any conduct described in subsection 3. No liability shall accrue to the commission or its authorized representative in proceeding against any person pursuant to this section.

North Dakota Century Code section 49-22-03(3) provides:

"Construction" includes any clearing of land, excavation, or other action that would affect the environment of the site after April 9, 1975....

The Certification to Order Provisions – Transmission Facility Siting, executed by Dakota Access on May 20, 2015, and incorporated into and made a part of the Commission's January 20, 2016; May 24, 2016; and June 22, 2016 Orders issuing a certificate of corridor compatibility and a route permit for Dakota Access' Dakota Access Pipeline Project, provides:

12. Company understands and agrees that if any cultural resource, paleontological site, archeological site, historical site, or grave site is discovered during construction, it must be marked, preserved and protected from further disturbances until a professional examination can be made and a report of such examination is filed with the Commission and the State Historical Society and clearance to proceed is given by the Commission.

....

38. ROUTE ADJUSTMENT WITHIN DESIGNATED CORRIDOR, NO AVOIDANCE AREA AFFECTED: Before conducting any construction activities for any adjustment to the designated route within the designated corridor under NDCC 49-22-16.3(1), the Company will file:

- a. Certification and supporting documentation affirming that construction activities will be within the designated corridor, will not affect any known exclusion or avoidance areas within the designated corridor;
- b. Certification and supporting documentation, including a map meeting the requirements of N.D. Admin. Code § 69-06-04-01(2)(n) identifying the designated corridor, route and the route adjustment; and
- c. Certification that Company will comply with the Commission's order, law and rules designating the corridor and route.

### III

On October 25, 2016, Keitu Engineers & Consultants, Inc. (Keitu) filed a construction inspection report (Report) concerning the Dakota Access Pipeline Project (Project). Keitu reported that during an October 21, 2016 construction inspection of the Project, it was noted that an area had been flagged and construction of a route adjustment was in progress. The Report further indicated that Keitu inspectors were informed by Dakota Access' environmental inspector that the route adjustment had taken place as a result of an unanticipated discovery which occurred on or around October 15, 2016.

### IV.

Staff contacted Dakota Access on October 25, 2016 to request information concerning the unanticipated discovery and the route adjustment. A deadline of October 27, 2016, was given for a response by Dakota Access to this request for information.

### V.

On October 27, 2016, Dakota Access responded to the Staff's request. The response including a report of a professional examination regarding an unanticipated discovery of cultural materials, an explanation of events surrounding the discovery, a



map of the route adjustment and associated landowner information, and a letter from the North Dakota State Historic Preservation Office (SHPO), dated October 18, 2016, that concurred with the approach taken by Dakota Access to avoid the site containing the cultural materials.

The response by Dakota Access also included an affidavit by Joey Mahmoud, Vice President of Engineering for Dakota Access, which certified under North Dakota Century Code section 49-22-16.3(1) that all construction activities for the route adjustment will take place within the corridor previously established by the Commission, that the route adjustment will not impact any exclusion or avoidance areas, and that Dakota Access will comply with the Commission's orders, laws, and rules designating the corridor and route.

#### VI.

In a letter dated October 28, 2016, Staff acknowledged receipt of the Dakota Access's certification under North Dakota Century Code section 49-22-16.3(1) for the route adjustment.

#### VII.

Based on its investigation, Staff determined that an unanticipated discovery of cultural materials occurred on October 17, 2016.

#### VIII.

Based on its investigation, Staff determined that the Commission had not given clearance to proceed prior to Dakota Access beginning construction on the route adjustment.

IX

Based on its investigation, Staff determined that Dakota Access had not filed the required certifications under North Dakota Century Code section 49-22-16.3(1) prior to beginning construction on the route adjustment.

X.

Based on its investigation, Staff determined that construction of the route adjustment commenced no later than October 21, 2018 and continued through October 25, 2016.

XI.

Based on its investigation, Staff concluded that Dakota Access violated the Commission's January 20, 2016; May 24, 2016; and June 22, 2016 Orders issuing a certificate of corridor compatibility and a route permit for the Dakota Access Pipeline Project by failing to obtain a clearance to proceed from the Commission prior to beginning construction on the route adjustment.

XII.

Based on its investigation, Staff concluded that Dakota Access violated the Commission's January 20, 2016; May 24, 2016; and June 22, 2016 Orders issuing a certificate of corridor compatibility and a route permit for the Dakota Access Pipeline Project by failing to file with the Commission the required certifications under North Dakota Century Code section 49-22-16.3(1) prior to beginning construction on the route adjustment.

XIII.



The Respondent must serve an answer to this complaint upon the Complainant and the Commission within twenty days after service of the complaint, or the Commission may deem the complaint to be admitted. Answers must be served in the manner allowed for service under the North Dakota Rules of Civil Procedure.

### **Prayer for Relief**

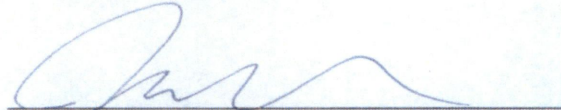
Based on the foregoing, Staff seeks the following relief:

1. That the Commission find Dakota Access, LLC in violation of the Commission's January 20, 2016; May 24, 2016; and June 22, 2016 Orders issuing a certificate of corridor compatibility and a route permit for Dakota Access LLC's Dakota Access Pipeline Project by failing to obtain a clearance to proceed from the Commission prior to beginning construction on the route adjustment.
2. That the Commission find Dakota Access, LLC in violation of the Commission's January 20, 2016; May 24, 2016; and June 22, 2016 Orders issuing a certificate of corridor compatibility and a route permit for Dakota Access LLC's Dakota Access Pipeline Project by failing to file with the Commission the required certifications under North Dakota Century Code section 49-22-16.3(1) prior to beginning construction on the route adjustment.
3. That the Commission impose an appropriate civil penalty up to \$10,000 per violation per day, but at least \$10,000 for violating the Commission's Orders in this case by failing to obtain a clearance to proceed from the Commission prior to beginning construction on the route adjustment and \$5,000 for violating the Commission's Orders in this case by failing to file with the Commission the required certifications under North

Dakota Century Code section 49-22-16.3(1) prior to beginning construction on the route adjustment.

4. Such other relief that the Commission finds just and proper.

Dated this 7<sup>th</sup> day of November, 2016



John M. Schuh (ND Bar ID No. 08138)  
Special Assistant Attorney General  
600 E Boulevard Ave – Dept 408  
Bismarck, North Dakota 58505-0480  
(701) 328-2421  
Attorney for Advocacy Staff

and

Julie Prescott  
Public Utility Analyst  
600 E Boulevard Ave – Dept 408  
Bismarck, North Dakota 58505-0480  
(701) 328-4188  
Public Service Commission Advocacy Staff



**APPROVED**

DATE: 11-8-16

[Signature]

**MOTION**

**November 8, 2016**

**Dakota Access, LLC  
Dakota Access Pipeline Project  
Siting Application**

**Case No. PU-14-842**

I move the Commission find the November 7, 2016 Formal Complaint filed by the North Dakota Public Service Commission Advocacy Staff states a *prima facie* case, and serve the Complaint on the Respondent in Dakota Access, LLC, Dakota Access Pipeline Project, Siting Application, Case No. PU-14-842.

PJF